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SACRAMENTO, CALIFORNIA

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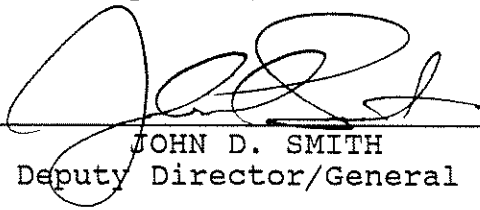
In re:
Request for Regulatory
Determination filed by
Patrick T. O'Connell
concerning the Department
of Corrections' Case
Records Manual, Chapters
100 through 1900, non-
inclusive¹

1989 OAL Determination No. 88-005
[Docket No. 88-005]
MARCH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

February 21, 1989

Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Department of Corrections' "Case Records Manual," Chapters 100 through 1900, noninclusive, which set forth rules and procedures for establishing, maintaining, using and disposing of informational case records for each inmate, are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that the above-noted chapters of the Department's Case Records Manual, are "regulations," except for certain sections that are either nonregulatory or are restatements of existing statutes, regulations, or case law.

b

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether the Department of Corrections' ("Department") Case Records Manual, Chapters 100 through 1900, noninclusive,⁴ which deal with establishing, maintaining, using and disposing of inmate informational records, including issues related to the disclosure of inmate information, the length of time records must be maintained, and opportunities to correct or comment upon material contained in records, are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁵

THE DECISION 6, 7, 8, 9

OAL concludes that the above-noted chapters of the Department's Case Records Manual (1) are subject to the requirements of the Administrative Procedure Act (APA),¹⁰ (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a), except for certain sections that are either nonregulatory or are restatements of existing statutes, regulations, or case law.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first, and for many years only, prison was located at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹¹ The Legislature has thus entrusted the Director of Corrections with a "difficult and sensitive job,"¹²

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein"¹³

Authority ¹⁴

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), currently provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁵ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹⁶

General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory and regulatory law, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations (CCR).

Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"¹⁷ by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations. "The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."¹⁸ Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 200 CCR pages.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules. The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Out-patient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual, which is the Manual being challenged by the Requester in this Determination.^{19,20} Manuals are updated by "Administrative Bulletins," which typically include replacement pages for modified manual provisions.

Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]²¹

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to

the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals" [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy. . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations.²² We simply refer to these documents as "operations plans."

The third tier of the regulatory scheme thus consists of hundreds (perhaps thousands) of these "operations plans," drafted by individual wardens and superintendents and approved by the Director. These plans often repeat parts of statutes, Director's Rules, and procedural manuals.²³

These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

In this Determination, however, we are concerned only with one segment of the Department's second tier--the Case Records Manual, and the sections specifically challenged by the Requester.²⁴

Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.²⁵ A two-pronged effort followed. Another bill was introduced;²⁶ the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.²⁷ Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill²⁸ passed the Legislature and was approved by Governor Brown.²⁹ In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]³⁰

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR. In subsequent years, court decisions have struck down portions of the second tier--the Classification Manual³¹ and parts of the Administrative Manual³²--for failure to comply with APA requirements.³³ OAL regulatory determinations have found the Classification Manual,³⁴ several portions of the Administrative Manual,³⁵ and two

sections of the Case Records Manual³⁶ to violate Government Code section 11347.5.

Background: This Request for Determination

Section 2081.5 of the Penal Code states:

"The Director of Corrections shall keep complete case records of all prisoners under custody of the department [Par.] Case records shall include all information received by the Director of Corrections from the courts, probation officers, sheriffs, police departments, district attorneys, State Department of Justice, Federal Bureau of Investigation, and other interested agencies and persons. Case records shall also include a record of diagnostic findings, considerations, actions and dispositions with respect to classification, treatment, employment, training, and discipline as related to the institutional correctional program followed for each prisoner. . . ."

On May 18, 1988, Patrick T. O'Connell ("Requester"), an inmate at the California State Prison at Folsom, filed a Request for Determination with OAL challenging certain sections of Chapters 100 through 1900, noninclusive, of the Department's Case Records Manual ("second tier" rules pertaining to the establishment, maintenance, use and disposition of individual inmate's informational records). The Manual is over 900 pages in length, including a revisions record, tables of contents, and exhibits. The Manual sections specifically challenged by the Requester are approximately 85 pages in length.

The Manual is divided into 28 "Chapters," grouped in six "Parts." The six Parts are:

- 1 - Uniform Case Records (Chapters 100 - 1100)
(According to the Requester's copy and OAL's copy of the Manual, there are no chapters 1200 - 1900)
- 2 - Records System (Chapters 2000 - 2300)
- 3 - Legal (Chapters 3000 - 3300)
- 4 - Release (Chapters 4000 - 4600)
- 5 - Parole (Chapter 5000)
- 6 - Specialized Records (Chapters 6000 - 6100)

The challenged provisions of the Manual deal with substantive areas related to the keeping of records, including issues related to inmate access to case records, the disclosure of inmate information, the recording of court decisions, orders

and releases, documents regarding detainers, notices and extraditions, time computation, the length of time records must be retained, and opportunities to correct or comment upon material contained in the records.

On December 2, 1988, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.³⁷

On January 17, 1989, the Department filed a Response to the Request with OAL. In its Response, the Department states that the

"Case Records Manual contains a compilation of codified laws, case-law, and staff instructions relative to the process in receiving, releasing, and computing of time to serve for inmates/parolees under the jurisdiction of the Department. . . . [Par.] . . . In some sections, the manual recites Board of Prison Terms rules, requirements for retention of records, and provides forms to assist an inmate in resolving outstanding cases in the judicial system. . . ."38

II. DISPOSITIVE ISSUES

There are two main issues before us:³⁹

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.⁴⁰ It has been judicially held that "rules significantly affecting the male prison population" are of "general application."⁴¹ The challenged rules governing the establishment, maintenance, use and disposition of inmates' informational records, as set forth in the Case Records Manual, significantly affect all inmates statewide in the custody of the Department. This statewide application is evidenced by the Department's policy stated in section 102(a) of the Department's Administrative Manual:

"It is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals" [Emphasis added.]

The answer to the second part of the inquiry is also "yes," except for the challenged sections that are either nonregulatory or restatements of existing statutory, regulatory or case law.⁴²

We note several problems with the Case Records Manual, e.g., Manual sections that restate Department or Board of Prison Terms' ("BPT") regulations which have been repealed and Manual sections that refer to nonapplicable or inaccurate Penal Code sections, or the Penal Code section has been repealed. We recognize the important role the Manual plays in conveying instructions to agency staff and informing the staff of applicable statutory, regulatory and decisional law. However, the importance of updating the Manual on at least a yearly basis cannot be stressed enough; this would help avoid the confusion and problems contained in the Case Records Manual.

For purposes of this Determination, and as examples of the numerous regulatory provisions contained in the Manual,⁴³ we will focus on three challenged sections of the Manual that we have found to be regulatory.

EXAMPLE NO. 1 -- Challenged sections of Chapter 300:

The Requester specifically challenged sections 320, and 321(b) and (c) of Chapter 300. We will discuss these sections together since they all concern the length of time records will be retained before being disposed of by the Department's archives unit. The archives unit receives the records of all inmates after they are discharged from the Department's custody.

Section 320 states:

"Processing and Purging. (a) Upon receipt [by the departmental archives unit] of the records of discharged persons, the following purging and retention schedules will be followed.

(1) Medical and psychiatric files. Retain intact for seven years after discharge. These records will be destroyed at the end of the seven year period (22 [CCR] 70751(c)).

(2) Central Files. Retain intact for five years after discharge.

"(b) Five years after discharge, the Central File will be purged of all material except those items on the CEC Form 663, Purging Control Record. These items will be placed on microfilm and the originals destroyed. The microfilm cartridges will be retained for an additional 20 years, then destroyed." [Emphasis added.]

Subsections (b) and (c) of section 321, titled "Exceptions to General Processing and Purging Schedule," provide:

"(b) Discharged superior court diagnostic cases ("Z"). After being retained in the reception center for six months after discharge, all records for diagnostic cases will be forwarded to the archives unit. These records will be retained intact for an additional two and one-half years and then destroyed.

"(c) Records of deceased.

(1) Following a six month or conclusion of litigation retention period in the institution or parole region, the records will be forwarded to the archives unit. These records will be retained intact until three years after the death or conclusion of litigation. At the end of this period the procedure in Section 320 will be followed.

(2)"44

Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures" [Emphasis added.]

Manual sections 320 and 321(b) and (c) implement, interpret or make specific Penal Code section 5058 which provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons" [Emphasis added.]

These particular rules also implement, interpret or make specific Penal Code section 2081.5 which states in part:

"The Director of Corrections shall keep complete case records of all prisoners under custody of the department" [Emphasis added.]

Additionally, Manual sections 320 and 321(b) and (c) are rules set forth by the Department to govern its procedures for retaining and disposing of inmate records.

We note that subsection 320(a)(1) contains a reference to Title 22, CCR, section 70751(c). Section 70751(c) is a regulation of the State Department of Health Services, and falls within Division 5 ("Licensing and Certification of Health Facilities, Home Health Agencies, Clinics, and Referral Agencies"), Chapter 1 ("General Acute Care Hospitals"), Article 7 ("Administration"). Section 70751(c) provides in part:

"(c) Patient records including X-ray films or reproduction thereof shall be preserved safely for a minimum of seven years following discharge of the patient" [Emphasis added.]

Upon reviewing section 70751(c), we conclude that section 70751(c) governs the disposal of medical records by a hospital upon a patient's discharge from a general acute care hospital, not the disposal of medical records by the archives unit upon an inmate's discharge from a correctional facility of the Department. Hence, Manual subsection 320(a)(1) is not a restatement of governing regulatory law. The Department basically "borrowed" or "copied" the Department of Health Services' rule (section 70751(c)) in establishing a rule governing correctional facilities.

We therefore conclude that Manual sections 320 and 321(b) and (c) not only implement, interpret or make specific Penal Code sections 5058 and 2081.5, but that they also govern the Department's procedures for retaining and disposing of inmates' records, and therefore meet the definition of "regulation."

EXAMPLE NO. 2 -- Section 920(a)-(c):

Section 920(a)-(c) of Chapter 900, titled "Detainers, Notices and Extraditions," provides the following procedures:

"Article 3 - Notification to Filing Authorities

"Section 920. General Considerations. (a) Each agency which has filed a detainer against an inmate will be notified of the individual's pending release 90 days prior to the inmate's tentative release date.

"(b) Normally, it is departmental policy to release an inmate to the agency which placed the first detainer against the inmate if that agency wishes to exercise its detainer.

(1) However, if multiple detainers are on file, and one of the detainers is based upon a judgment and sentence to a term of imprisonment, the initial offer of custody will be to the agency holding the prison term detainer.

"(c) When multiple detainers are on file and the inmate is released to one of the detainers, the remaining detainers will be given to the transporting officers, and the other agencies will be notified of the release and the agency that assumed custody." [Original emphasis.]

Penal Code section 4755 describes the action the Department may take when a detainer is filed against a prisoner while

serving a term of imprisonment in the custody of the Department. Section 4755 further defines "detainer" as meaning a "warrant of arrest." Basically, a detainer is filed against the prisoner by an appropriate officer of another jurisdiction for untried criminal charges against the prisoner pending in the other jurisdiction. The detainer is a written request for temporary custody or availability of the prisoner so that the prisoner may be presented to the court in the other jurisdiction to resolve the pending actions.

We conclude that section 920 implements, interprets or makes specific Penal Code section 5058 (set out above under Example No. 1) and that it also governs Department procedures regarding the release of an inmate who has detainers filed against him or her.

EXAMPLE NO. 3 -- Section 1157

Section 1157 of Chapter 1100, titled "Retroactive Calculations," provides in part:

"Section 1157. Penal Code Sections 3022/3042 Notices

"(a) For all inmates who will have a SO [serious offender] hearing (after final determination is made by the BPT [Board of Prison Terms], notices will [be] sent to the judge and district attorney only. The notice will indicate that a hearing will be held 'no earlier than 30 days after the date of this notice.' No SO hearings will be held until the statutory 30 days have elapsed after the mailing of the notice.

"(b)"45 [Title of section 1157 underlined in the original; other emphasis added.]

A serious offender hearing is defined in Manual section 1150 as a hearing, to be conducted by BPT as authorized by Penal Code section 1170.2, "for the purpose of possibly extending the inmate's normally calculated DSL [determinate sentencing law] term. These extended term hearings are referred to as serious offender (SO) hearings." (Emphasis added.)

We find Manual section 1157 meets the definition of "regulation" for the following reasons. First, section 1157 implements, interprets or makes specific Penal Code 5058 (set out above in Example No. 1).

Second, Penal Code section 3022 was REPEALED on July 1, 1977,⁴⁶ and related to the notice of the meeting to fix the term of imprisonment. Therefore, Manual section 1157 is not a restatement of existing statutory law.

Third, Penal Code section 3042 requires that:

"(a) At least 30 days before the [BPT] . . . meet[s] to review or consider the . . . setting of a parole date for any prisoner sentenced to a life sentence [e.g., an indeterminate term], the [BPT] shall send written notice thereof to each of the following persons: the judge of the superior court before whom the prisoner was tried and convicted, the attorney who represented the defendant at trial, the district attorney of the county in which the offense was committed, the law enforcement agency that investigated the case, and where the prisoner was convicted of the murder of a peace officer, the law enforcement agency which had employed that peace officer at the time of the murder. In the case of a prisoner sentenced to a life sentence for first-degree murder, the [BPT] shall also send written notice to the next of kin of the person murdered where a request for such notice has been filed with the [BPT] by the next of kin.

We find the use of a "section 3042" notice for notification of an SO hearing quite confusing. The "section 3042" notice is used in a particular situation which concerns inmates serving an indeterminate sentencing term (life sentence); whereas, the SO hearing is for possibly extending an inmate's determinate sentencing term. Assuming, without deciding, that use of a "section 3042" notice for notification of an SO hearing is appropriate, section 3042 nonetheless requires the notice be sent to the superior court judge, the district attorney, the inmate's defense counsel, the investigating law enforcement agency, and possibly two other interested parties. In sharp contrast, Manual section 1157 states that notice will be sent only to the superior court judge and the district attorney. Manual section 1157 thus carves out another use for a "section 3042" notice and limits the number of persons to be notified to less than that required by section 3042.

We therefore find that Manual section 1157 meets the definition of "regulation" and must be adopted pursuant to the APA.

WE THEREFORE CONCLUDE, BASED ON OUR ANALYSES, FINDINGS, AND CONCLUSIONS STATED HEREIN AND IN PRIOR DETERMINATIONS, THAT THE CHALLENGED SECTIONS OF CHAPTERS 100 THROUGH 1900 OF THE DEPARTMENT'S CASE RECORDS MANUAL ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), EXCEPT THOSE SECTIONS THAT ARE EITHER NONREGULATORY OR ARE RESTATEMENTS OF EXISTING STATUTORY OR REGULATORY LAW.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.⁴⁷

The internal management exception is applicable to a number of the rules set forth in the Case Records Manual. For example, section 927(b) states:

"Section 927. Release to Subsequent Prison Commitments.

(a)

"(b) When it is determined that an individual is eligible for release to an agent of another state, the correctional case records manager will make arrangements for the release of the inmate on the date of his scheduled release at a time convenient to transporting officers, insofar as possible, within normal business hours." [Heading underlined in the original.]

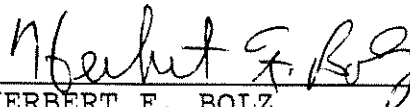
Section 927(b) relates only to the "internal management" of the Department, and thus the internal management exception applies and section 927(b) is not subject to APA requirements.

As discussed above, however, under the heading "II. DISPOSITIVE ISSUES," a substantial number of the rules set forth in the Department's Case Records Manual, in Chapters 100 through 1900, are standards of general application which implement, interpret or make specific the law enforced or administered by the Department or govern the Department's procedures. These rules of a regulatory nature fall neither within the internal management exception nor within any other recognized APA exception.

III. CONCLUSION

For the reasons set forth above, OAL finds that the Department's Case Records Manual, Chapters 100 through 1900, noninclusive, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a), except for certain sections that are either nonregulatory or are restatements of existing statutes, regulations, or case law.

DATE: February 21, 1989


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- 1 This Request for Determination was filed by Patrick T. O'Connell, B-97941 (Patterson), 2-A1-06 Folsom, Represa, CA 95671. The Department of Corrections was represented by Gregory W. Harding, Deputy Director, Evaluation and Compliance Division, and Sara L. Bruce, Chief, Regulations and Policy Management Unit, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

To facilitate indexing and compilation of determinations, OAL assigned--beginning with 1989 OAL Determination No. 1--consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "59" rather than "1."

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186

Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services recently submitted to OAL (OAL file number 88-1208-02) Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 47, infra).

³ Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121,

subdivision (a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

This and other OAL regulations are indexed in the annual APA/OAL regulations booklet, available at no cost from OAL.

4 The Requester specifically stated that he was not challenging Chapters 200, 500, 600, 700 or 950 of the Case Records Manual; therefore, OAL did not review these chapters for purposes of this Determination.

5 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15

days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

- 6 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

7 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrast-

ing viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, no public comments were submitted to OAL. On January 17, 1989, the Department submitted a Response to the Request for Determination, which was considered in making this Determination.

- 8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
- 9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 19.
- 10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 11 Penal Code section 5000.
- 12 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
- 13 Penal Code section 5054.
- 14 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing

a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 15 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).
- 16 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
- 17 California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

- 18 Id.
- 19 As listed in Administrative Manual, chapter 200, section 240, effective 5-18-84.
- 20 The Case Records Manual is over 900 pages in length; the challenged sections of the Manual at issue in this Determination are approximately 85 pages in length; the Manuals in toto take up about five to six feet of shelf space.
- 21 This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.
- 22 See Administrative Manual section 242(d).
- 23 The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.
- 24 Pursuant to the Requester's request, OAL waived the filing requirement that the Requester submit a copy of the challenged rule due to its length, alleged unavailability to the Requester, and the Requester's alleged indigent status. The fact that OAL has a copy of the Manual in its library was also considered in granting the request.

The following is a list of sections challenged by the Requester--but not reviewed by OAL--because these particular sections (as provided by the Requester) have a different revision date than the sections in OAL's copy of the Manual. If the Requester wishes OAL to review these sections, he must submit another request for determination and provide a copy

of the rules he wishes to challenge.

<u>SECTIONS</u>	<u>REQUESTER'S REVISION DATE</u>	<u>OAL'S REVISION DATE</u>
465, 466, 467, 469, 467, 469, 470, 471, 472	10/24/79	4/22/80
800(f)	3/31/81	2/1/82
811(b), (c), (d), (e), and (g), 812(a) and (b), 813(a), 814(a) 815, 816(b), (c), (d), and (f), 825(a), 830, 831(a) and (b)	3/31/81	11/17/78
831(d)(3) and (d)(4)	3/31/81	10/24/79
1003(b)	3/16/81	9/2/81
1006(c)	9/2/81	3/16/81
1071(b)(5)(1) and (b)(5)(2)	4/22/80	not in OAL's copy
1078	11/17/78	not in OAL's copy
1082(c)	11/17/78	9/23/83
1163, 1164(a) and (d)	3/16/81	11/17/78

NOTE: Sections 1002 and 1053 were previously challenged in 1988 OAL Determination No. 19, and therefore were not reconsidered in this Determination. See note 36, infra.

25 AB 1270(Sieroty/1971).

26 SB 1088(Nejedly/1973).

27 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

28 All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of

the legislation.

- 29 AB 1282(Sieroty/1975).
- 30 Section 3 of Statutes of 1975, chapter 1160, page 2876.
- 31 Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.
- 32 Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
- 33 These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process"
- 34 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.
- 35 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810--7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No.10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, sections 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (Chapter 7300, Administrative Manual).

Portions of the above noted chapters and sections were found not to be "regulations."

- 36 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory).
- 37 Register 88, No. 49-Z, p. 3849.
- 38 Agency's Response, p. 1.
- 39 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 40 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 41 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
- 42 Below are examples of provisions of the Case Records Manual which are either nonregulatory or are restatements of existing statutory, regulatory or case law.

1. Section 101. Background and Definition of Case.

This section provides that the Director of Corrections has a duty to keep complete case records of all prisoners and that such records shall be made available to BPT. The section specifies the the case records shall include all information received by the director from interested agencies and persons, and a record of diagnostic findings, considerations, actions and dispositions with respect to classification, treatment, employment, training, and discipline as related to the institutional correctional program followed for each prisoner (Penal Code section 2081.5).

As this section indicates by its Reference citation, this section is a restatement of Penal Code section

2081.5. Manual section 101 neither adds to nor subtracts from the basic language contained in Penal Code section 2081.5.

2. Section 102. Purpose.

Section 102 describes the primary purpose for the Case Records Manual as establishing and maintaining information and documentation on each inmate to provide, among other things, departmental and releasing authority staff with comprehensive information to allow for case decisions. This section is merely descriptive and informational, and thus nonregulatory.

3. Section 416(e)(3). This subsection provides:

"(e) The following kinds of information will be classified as confidential and will not be disclosed to the inmate or to any person where such disclosure would defeat the purpose of the confidential classification.

.

(3) Specific medical, psychiatric or psychological information which would, if known to the inmate, be medically or psychologically detrimental. The possibility of such information impairing the effectiveness of treatment or the relationship between staff and inmate, is not a valid reason for designating records, files or information as confidential.

(A) All psychological and psychiatric reports and evaluations classified as confidential will contain the specific reason or reasons why that report or portions thereof should be classified as confidential.

(B) Psychological or psychiatric reports or evaluations that have been classified as confidential but do not contain the reason for such classification, will be referred to the originator for proper classification. If the originator of the report is not available, the caseworker will refer the report to a staff psychologist or psychiatrist to determine the need for confidentiality."

Subsection 416(e)(3) is a restatement of the case, In re Olson (1974) 37 Cal.App.3d 783, 788, n. 5, 112 Cal.Rptr. 579, 582, n. 5 (There is no authority for the proposition that the state has an interest in confidentiality to protect the rehabilitative relationship established

between the correctional staff and the inmate and his family or acquaintances.).

Subsection 416(e)(3)(A) is a restatement of Title 15, CCR, section 3321(b)(3)(B). Subsection 416(e)(3)(B) relates only to the internal management of the Department, and thus falls within the internal management exception.

4. Section 444. Statement of Disagreement.

Section 444 concerns the inmate's appeal process of the caseworker's denial to amend the record. This section restates Civil Code sections 1798.36 and 1798.37.

5. Section 801(c) quotes a small portion of Penal Code section 2620, which concerns an order for the temporary removal of an inmate from prison for the inmate's appearance before a court, grand jury or magistrate. Section 2620 requires that the order "recite the purpose for which the person is to be brought before the court." The latter half of Manual section 801(c) merely provides sources where such information may be sought if such information is not included in the order, and thus is nonregulatory.

6. Section 803(a). This section states that superior court orders should be signed by a judge, bear the seal of the court and be certified by the county clerk (two of the three requirements will suffice). Section 803(a) restates Penal Code sections 2620, 2621 and 1567; all three sections require a signature by the judge and the seal of the court, if there is one. We read the last part of the sentence, "two of the three requirements will suffice," as instructions to departmental staff to assist in determining the validity of such an order when presented to the staff for the release of the inmate, and thus it is within the internal management exception.

7. Section 949(e) provides that an executive order is sufficient authorization to remove a prisoner from an institution for extradition purposes for a hearing to be held in another state. This merely restates Penal Code section 1550.1.

8. Section 1105(c) provides "The forms or certifications of time spent in county jail prior to sentencing are not applicable to cases sentenced after 3/4/72." This statement is part of the holding in In re Kapperman (1974) 11 Cal.3d 542, 114 Cal.Rptr. 97.

9. Section 1008(c) states "In applying preprison credits, the date of minimum eligible parole, minimum and maximum

sentence, is computed by adding the statutory period to the date of delivery and subtracting the applicable credits." This is the only legally tenable reading and application of Penal Code sections 2900 and 2900.5.

10. Section 1042 states "Time ceases to run on a prison sentence when an inmate is released on bail. Upon return to our custody, in the same criminal matter, the period of time spent on bail is computed as dead time and is not considered as time served." This section is merely a restatement of Penal Code section 2900, subdivision (c)(1).

The above is not intended as an exhaustive list of possible restatements of existing law or nonregulatory provisions of the challenged sections of the Case Records Manual.

- 43 Below are additional examples of the numerous regulatory provisions contained in the challenged portions of the Case Records Manual. Each provision meets both prongs of the statutory definition of "regulation":

1. Section 105. Central File Security. This section sets out the procedures for handling and transporting inmates' central files. This section implements, interprets or makes specific Penal Code section 5058, and governs the Department's procedures for dealing with inmates' central files. Section 105 also implements, interprets or makes specific Civil Code sections 1798.20, 1798.21 and 1798.30 (portions of the Information Practices Act).

Civil Code section 1798.20 states that

"Each agency shall establish rules of conduct for persons involved in the design, development, operation, disclosure, or maintenance or records containing personal or confidential information and instruct each such person with respect to such rules and the requirements of this chapter, including any other rules and procedures adopted pursuant to this chapter and the remedies and penalties for noncompliance."

Civil Code section 1798.21 provides that

"Each agency shall establish appropriate and reasonable administrative, technical, and physical safeguards to ensure compliance with the provisions of this chapter, to ensure the security and confidentiality of records, and to protect against an-

anticipated threats or hazards to their security or integrity which could result in any injury."

Civil Code section 1798.30 requires that

"Each agency shall either adopt regulations or publish guidelines specifying procedures to be followed in order fully to implement each of the rights of individuals set forth in this article [article 8]."

2. Section 416(e) lists the kinds of information received for inserting into an inmate's file that will be classified as confidential. The Requester specifically challenges section 416(e)(4) which states "Information which another governmental agency has classified as confidential and that agency is not known to have accepted the department's standards for confidentiality." (Emphasis added.) The above-underlined portion of section 416(e)(4) supplements Title 15, CCR, section 3321(a)(4) which states that "Information provided and classified confidential by another governmental agency," will be classified as confidential. The underlined portion of Manual section 416(e)(4) is not required in the duly-adopted regulation (section 3321(a)(4)).
3. Section 921. Notification Letter to Federal Agency. This section states that when a detainer is filed by a U.S. Marshal's office, ninety days prior to an inmate's scheduled release date, the correctional case records manager will notify the U.S. Marshal of the district in which the institution is located, as well as the U.S. Marshal's office which filed the detainer. This section governs the Department's procedures for notifying a federal agency which has filed a detainer against an inmate in the custody of the Department.
4. Section 926(a) provides that an

"inmate being discharged or paroled from a California institution may be released directly to an agent of another paroling agency only if:

 - (1) The detainer is for violation of parole; and
 - (2) The inmate was legally residing in California and under supervision of the Parole and Community services Division Interstate Unit at the time of his incarceration on the California term."

The Department did not provide, nor were we able to find

existing law that set forth the above conditions before an inmate could be released into the custody of another paroling agency. We conclude that section 926(a) implements, interprets or makes specific Penal Code section 5058.

5. Section 1005(a) (section 1005 is titled "In re Kapperman Credit") states that "It is the responsibility of the inmate/parolee to initiate the request for such credits and to deliver the completed forms (original and one) to his caseworker (correctional counselor/parole agent). . . ." The Kapperman court did not specify who is responsible for initiating review of records for application of Kapperman credits (credit for time in custody prior to commencement of sentence), but held that equal protection required that Penal Code section 2900.5 credits (credit for time in custody prior to commencement of sentence) were to be applied retroactively. Therefore, section 1005(a) implements, interprets or makes specific Penal Code section 2900.5 and In re Kapperman.

- 44 Subsection 321(c)(2) states that "The correctional case records manager of the institution or parole region is responsible for the determination of the status of litigation, before transferring the case to the archives unit." We find that subsection 321(c)(2) falls within the "internal management" exception to APA requirements and therefore was not set forth in the text. See discussion of "internal management" exceptions, set forth under the "SECOND INQUIRY" subheading, in Part II.

- 45 Subsection 1157(b) provides: "When the notice, BPT Form 1088, is sent to the judge it will be addressed:

'To: The Hon. (judge's name)
Judge of the Superior Court.'

Subsection 1157(b) is nonregulatory; it is merely informational; an appropriate way to address a letter to a judge.

- 46 Statutes 1977, chapter 165, page 666, section 43, effective June 29, 1977, operative July 1, 1977.

- 47 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of

- the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available

from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

- 48 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris in the preparation of this Determination.